BRIEF AND ARGUMENT IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

BRIEF OF AUTHORITIES.

1. **Under the law of Florida insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, insured's claim to indemnity.**

Price v. *Prudential Ins. Co.,* 98 Fla. 1044; 124 So. 817.

Kimbal v. *Travelers Ins. Co.* (Florida Supreme Ct.) 10 So. 2nd 728, 729.

Martin v. *Sun Ins. Office of London,* 83 Fla. 325; 91 So. 363, 366.

Elliott v. *Belt Automobile Ass'n.,* 87 Fla. 545; 100 So. 797, 798.

Sovereign Camp W. O. W. v. *Lee* (Florida Supreme Ct.) 171 So. 526, 528.

Franklin Life Ins. Co. v. *Tharpe* (Florida Supreme Ct.) 178 So. 300, 302.

Inter-Ocean Casualty Co. v. *Hunt* (Florida Supreme Ct.) 189 So. 240, 243.

2. **Death does not result directly or indirectly of service, travel or flight in an aircraft within the meaning of an insurance contract containing such language when a new and independent cause intervenes which in itself results in the death.**

Richmond Coal Co. v. *Commercial Union Assur. Co.,* 169 Fed. 746, cert. denied, 215 U. S. 609; 54 L. Ed. 347; 30 S. Ct. 410.

Pacific Union Club v. *Commercial Union Assur. Co.,* 12 Cal. App. 509; 107 Pac. 728.

Travelers Ins. Co. v. *Johnston,* (Supreme Court Arkansas) 162 S. W. 2nd 480 (1942).

Tierney v. *Occidental Life Ins. Co. of California,* 89 Calif. App. 779; 265 Pac. 400.

3. The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. This Court accepts these findings as the conclusive basis for decision.

When the district court and circuit court of appeals have agreed as to the ultimate facts established by the evidence, their finding will be accepted by this court, unless it clearly appears that they have erred as to the effect of the evidence.

Stuart v. *Hayden, et al.,* 169 U. S. 1, 18 S. Ct. 274.

"On the questions of fact, both courts below decided against the petitioners. Under the well established rule this court accepts the findings in which two courts concur, unless clear error is shown, *Stuart* v. *Hayden,* 169 U. S. 1, 14, 18 S. Ct. 274, 42 L. Ed. 639; *Texas & Pacific Railway Company* v. *Railroad Commission,* 232 U. S. 338, 34 S. Ct. 438, 58 L. Ed. 631; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78, 34 S. Ct. 725, 58 L. Ed. 1220; *Bodkins* v. *Edwards,* 255 U. S. 221, 223, 41 S. Ct. 268, 65 L. Ed. 595.

Texas & N. O. R. Co. v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 50 S. Ct. 427, at 429.

Virginian Ry. Co. v. *System Federation No. 40,* 300 U. S. 515, 57 S. Ct. 592, at 596.

4. The incontestability clause in a life insurance policy, after the expiration of the contestable period, bars and precludes every defense to or contest of the policy on any

ground which is not specifically reserved or excepted in the incontestability clause itself.

Bernier v. *Pacific Mutual Life Ins. Co.* (La. Supreme Ct. 1932) 173 La. 1078; 139 So. 629.

Afro-American Life Ins. Co. v. *Jones* (Fla. Supreme Ct. 1933) 113 Fla. 158; 151 So. 405-406.

State ex rel. Republic Nat. Life Ins. Co. v. *Smrha,* (Neb. Supreme Ct. 1940) 293 N. W. 372, 373.

Northwestern Mutual Life Ins. Co. v. *Johnson,* 254 U. S. 96, 65 L. Ed. 155, 159.

(a) The object of an incontestability clause is to create an absolute assurance that the insured or the beneficiary will receive the benefits of the policy.

Northwestern Mutual Life Ins. Co. v. *Johnson,* (U. S. Supreme Ct. 1920) 254 U. S. 96; 65 L. Ed. 155, 159.

State ex rel. Republic National Life Ins. Co. v. *Smrha* (Neb. Supreme Ct. 1940) 293 N. W. 372.

Penn Mut. Life Ins. Co. v. *Childs* (Ga. Ct. of App. 1941) 16 S. E. 2nd 103, 108.

Harris v. *Security Life Ins. Co.* (Mo. Supreme Ct. 1913) 248 Mo. 304; 154 S. W. 68 (70).

(b) The language of life insurance contracts is construed strictly against the insurer.

Aschenbrenner v. *United States Fidelity & Guaranty Co.* (U. S. Supreme Ct. 1934) 292 U. S. 80; 78 L. Ed. 1137, 1140.

Mutual Life Ins. Co. v. *Hurni Packing Co.* (U. S. Supreme Ct. 1923) 263 U. S. 167; 68 L. Ed. 235, 238.

Winer v. *New York Life Ins. Co.* (Fla. Supreme Ct. 1939) 130 Fla. 115; 190 So. 894.

(c) If there is any reasonable doubt as to the extent of the application of the incontestability clause it must be resolved in favor of the beneficiary.

Independent Life Ins. Co. v. *Carroll* (Ala. Supreme Ct. 1930) 222 Ala. 34; 130 So. 402, 404.

Mareck v. *Mutual Reserve Fund Life Ass'n.* (Minn. Supreme Ct. 1895) 62 Minn. 39; 64 N. W. 68, 69.

Royal Circle v. *Achterrath* (Ill. Supreme Ct. 1903) 204 Ill. 549, 570; 68 N. E. 492.

(d) The provisions of the incontestability clause extend to and are for the benefit of the benficiary named in the policy.

Mutual Life Ins. Co. v. *Hurni Packing Co.* (U. S. Supreme Ct. 1923) 263 U. S. 167; 68 Ed. 235, 239.

Monahan v. *Metropolitan Life Ins. Co.* (Ill. Supreme Ct. 1918) 283 Ill. 136, 141; 119 N. E. 68.

(e) Respondent perfected a cross appeal to preserve the point on the ruling of the District Court on the incontestability clause of the policy. The Circuit Court of Appeals did not pass on this question, nor did it reject the theory of respondent in her right to recover under the incontestability clause. The Circuit Court of Appeals simply held that the disposition of the case upon the appeal of petitioner rendered it unnecessary to decide the question raised by the cross appeal. That Court simply said that the cross appeal need not be sustained. This question is still in the case and by stipulation of the parties entered into on June 27, 1944, which was approved by the order of the Circuit Court of Appeals on June 28th, 1944, the cross appeal is made a part of the record in this case, and becomes a part of the record in this Court (R. 199-202).

ARGUMENT OF RESPONDENT.

Petitioner now contends that the only issue in the case is one of law. It had an opportunity in the trial court to have the case tried on the question of law, but it waived its opportunity to do so, and elected to try it as an issue of fact.

The complaint (R. 2-4) was based upon the contract of insurance, a copy of which was made a part of the complaint as Exhibit "A", (R. 5-31), and was in the usual form for recovery on a life insurance policy. Petitioner filed an answer alleging that the death resulted directly or indirectly from service, travel or flight in an aircraft (R. 32-36). Plaintiff filed a reply denying the allegations of the answer as to the cause of death, and affirmatively averred that Richard Bull met his death directly as the result of an attack by the armed forces of the government of Japan against Richard Bull and others of the armed forces of the United States, and that the direct and proximate cause of his death was the attack made upon him by the Japs, and not as a result, directly or indirectly, of service, travel or flight as a passenger or otherwise in a species of aircraft (R. 37-39).

If petitioner desired to raise a question of law upon the facts it had an opportunity to do so after the reply was filed, as then it clearly appeared from the answer and the reply that Bull met his death while engaged in the armed forces of the United States. Petitioner joined issue and the case was tried before a jury.

The issuance of the policy was admitted by the answer, as well as the fact of death. The sole issue before the jury

was whether or not Bull met his death as the result of war, or as the result of aviation. The jury found for respondent. The trial court approved the verdict upon motion for judgment notwithstanding the verdict and for a new trial. The Circuit Court of Appeals has concurred in this finding of fact.

Respondent contends that under the well established rule this Court accepts the findings in which the two courts concur unless clear error is shown, and accepts these findings as the conclusive basis for decision. *Stuart* v. *Hayden, et. al.*, 169 U. S. 1, 18 S. Ct. 274; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, at 429; *Virginian Ry Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592, at 596.

Therefore, respondent contends that the jury, the trial court, and the Circuit Court of Appeals for the Seventh Circuit have decided, that under the facts of this case the insured did not meet his death "as a result, directly or indirectly, of service, travel or flight in any species of aircraft," but that his death resulted from a war risk; i. e., the strafing attack by the Japanese plane. This decision is in accord with the law of Florida where the policy was issued, as well as the general law, and is based upon sound reason and logic.

At the time the policy was issued insured was in training as a United States Navy Aviation Cadet, and this fact was stated in his application for insurance (R. 27). At the time the policy was issued most of the countries of Europe were at war, Japan was at war with China, and preparations for war were being rushed in the United States. With full knowledge of these facts the company issued the policy here involved without inserting in it a war risk exclusion clause, and as petitioner admits in its brief at page 15, the company by said policy "intended to cover war risks."

At the time of the strafing attack by the Japanese plane, the seaplane floated on the water at anchor a short distance from shore. It was disabled and could not fly again without repairs. (R. 47, 53, 54, 59, 61, 71). As was stated by the Circuit Court of Appeals, it was useful only as a raft. The motors were stopped. The seaplane was not on fire. Insured was in good health and uninjured (R. 50, 68, 69). The flight of the seaplane had terminated, all travel in it had ceased, and service in it had ended.

Approximately ten minutes later a Japanese war plane located the disabled seaplane and made a low level strafing attack. When last seen by the witnesses, insured was on the fuselage of the seaplane attempting to inflate a rubber life boat in which to reach shore. The Japanese plane fired its machine guns at the seaplane and insured was exposed to this gun fire (R. 49). Finally bullets from the Jap plane caused a great explosion of the seaplane and of the gasoline on the water around it. Insured was never seen after the strafing attack (R. 48, 49, 56, 62, 69).

Particularly in a case of this character other cases are helpful in reaching a decision only to the extent that they announce the general rules to be applied. After all, each case of this type must be decided largely upon the special facts belonging to it. The foregoing facts reasonably and logically considered in view of the language of the policy, the probable intention of the parties, and the circumstances under which the policy was issued impel one to the conclusion that insured's death resulted from warfare and did not result directly or indirectly from service, travel or flight in an aircraft.

It is admitted by both parties that since the insurance contract was made in Florida the law of that State applies.

Petitioner admits in its brief, page 13, that there is no Florida decision construing the aviation clause contained in this policy or passing upon the facts here involved.

The Florida Supreme Conrt has, however, announced and followed rules for the construction of insurance contracts in accord with the overwhelming weight of authority in other jurisdictions, and also in accord with the decision rendered in this case by the Circuit Court of Appeals.

In the case of *Price* v. *Prudential Ins. Co.*, 98 Fla. 1044; 124 So. 817, the Court considered an insurance policy which provided, "No accidental death benefit shall be payable if the death of the insured resulted * * from having been engaged in aviation * *." At page 819 of its opinion the Court said:

> "A policy of insurance is designed to secure the indemnity stated in the policy, and the terms used should be so construed as to effectuate the purpose designed, ambiguous provisions being fairly construed in favor of the beneficiary of the policy, the purpose of the contract being indemnity. Insurance companies are bound by their valid contracts of insurance, and where a risk is included in or covered by the indemnity contract and is not clearly excepted from the risks assumed by the insurer, the indemnity should be enforced in accordance with the legal meaning and effect of the contract which should be fairly interpreted by a just consideration of the language used, the subject matter, and the object of the indemnity provisions;"

and at page 820:

> "The provision that no accidental death benefit shall be payable if the death of the insured resulted 'from having been engaged in aviation * * * operations' means that the death of the insured must have resulted from having taken part in an aviation operations other than by merely being in an airplane when it fell to the ground and caught fire thereby fatally injuring the insured. Being 'engaged in aviation operations' means taking part in the operations of an

airplane in some direct way, other than merely participating in aeronautics by being in an airplane while it is in the air."

In *Sovereign Camp W. O. W.* v. *Lee,* 171 So. 526, 528, the Florida Supreme Court said:

> "When doubts arise in the interpretation of an insurance policy, they should be resolved in favor of the insured."

In *Franklin Life Ins. Co.* v. *Tharpe,* 178 So. 300, 302, the Florida Supreme Court said:

> "The purpose of a policy of insurance is intended or designed to secure the indemnity stated in the policy. When terms thereof are ambiguous, they should be fairly construed so as to effectuate their purpose, design and intent. This Court has held where there are conflicting clauses in an insurance policy, the one which affords the most protection to the insured will prevail."

Again, in *Elliott* v. *Belt Automobile Assn.,* 87 Fla. 545; 100 So. 797, 798, the Court said:

> "The rule is well established in this jurisdiction that where two interpretations equally fair may be given, that which gives the greater indemnity will prevail."

Again, in *Kimbal* v. *Travelers Ins. Co.,* 10 So. 2nd 728, 729, the Florida Supreme Court said:

> "It is settled law that insurance contracts must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity."

Petitioner asks the Court to construe the words "directly or indirectly" as contained in the aviation exclusion clause

in such manner as to relieve the company of liability in a case where a new and independent cause (having no relation to service, travel or flight by insured in an aircraft) intervenes and itself results in insured's death. Such a construction would "defeat without a plain necessity insured's claim to indemnity." The courts have refused to place such a strained, unreasonable, and unlogical construction upon the words "directly or indirectly."

In the case of *Richmond Coal Co.* v. *Commercial Union Assur. Co.,* 169 Fed. 746; *certiorari* denied 215 U. S. 609; 54 L. Ed. 347; 30 S. Ct. 410, suit was brought on a fire insurance policy insuring coal. The policy provided that the company "shall not be liable for loss caused directly or indirectly by * * earthquake * * or (unless fire ensues, and, in that event, for the damage by fire only,) by explosion * *." The coal was destroyed by fire following the San Francisco earthquake. At page 752 of its opinion the Court said:

> "Under the specific instructions referred to, the jury, in determining whether the earthquake was the proximate or remote cause of the fire that injured the subject of the action, could not be controlled by, nor, indeed, give any consideration to * * whether there were any new or intervening causes between the fires that were started or may have been started by the earthquake and that which caused the loss sued for, such as explosion, backfiring, dynamiting, the course or force of the winds, if any such occurred, * * all of which in our opinion, were proper matters for the consideration of the jury in determining whether fire or fires started by the earthquake were the proximate cause of the damage to the insured coal."

In *Pacific Union Club* v. *Commercial Union Assur. Co.*, 12 Cal. App. 509; 107 Pac. 728, suit was brought on a fire insurance policy which provided, "This company shall

not be liable for loss caused directly or indirectly by * * earthquake." The day after an earthquake, fire broke out. Because the water mains had been broken by the earthquake, water could not be obtained to fight the fire, and the property insured by the policy was destroyed. The insurance company contended that the earthquake was the indirect cause of the loss because it had destroyed the water mains which otherwise would have supplied water to extinguish the fire. The court denied the contention of the insurance company on the ground that it was not reasonable to suppose that the parties to the contract meant by this provision to exempt the company from liability where the connection between the earthquake and the fire was so remote.

In *Travelers Ins. Co.* v. *Johnston*, (1942) 162 S. W. (2d) 480, suit was brought on an accident insurance policy which provided, "This insurance shall not cover accident, injury, disability, death or other loss caused directly or indirectly, wholly or partly, by * * disease." Insured was afflicted with Paget's disease which is a degenerative condition of the bones and was injured when he fell while alighting from a cab. On appeal the insurance company contended that the instructions given by the trial court, including the following, were erroneous:

> "The fact that plaintiff had Paget's disease might have been a necessary element in producing a fall, yet such disease alone does not deprive the plaintiff of the right to recover if you further find from a preponderance of the evidence that the proximate cause of the fall was an accident."

The court there held the instructions were proper, and affirmed the judgment of the lower court.

In the case of *Tierney* v. *Occidental Life Ins. Co. of Cal.*, 89 Cal. App. 779; 265 P. 400, suit was brought on a life

insurance policy which contained the following aviation exception clause: "This policy does not cover any injury, fatal or non-fatal, sustained by the insured while participating or in consequence of having participated in aeronautics." In that case insured was a passenger in an airplane which landed at the airport. After the plane had been stopped at the airport for five or six minutes, and after insured had talked with airport officers, he stepped on to the wing of the plane and on to the ground, and then forward, bent over to avoid a drift wire, and as he straightened up was struck by the propellor which was still in motion. The Court affirmed a judgment for plaintiff's beneficiary, and at page 401 of its opinion said:

> "The flight was not the proximate cause, but there was the intervening act of the deceased in his poor judgment in so conducting himself after climbing out of the machine as to be struck by the propellor."

The opinion of the Circuit Court of Appeals in affirming the District Court (R. 183-188) clearly sets forth the position of respondent. Petitioner knew at the time the policy was written that Bull was an aviation cadet, and that he intended to continue in such service. No war clause was inserted. It is apparent, therefore, that the defendant was willing to, and did assume all risk of war. Therefore, the issue before the jury was, "Was the death of Bull under the cirumstances, a risk of war or of aviation? and, Was his death the result, directly or indirectly, of service, travel or flight in aircraft, or was it a war risk free from aviation?"

The proof in instant case established the fact that before the attack was made by the Japanese, Bull was well, uninjured and possessed all of his faculties; that the aircraft was disabled, lay in the water and could not be flown again. Judge Minton said in the opinion "it was useful only as a raft" (R. 186). Bull was not injured at any time while

the plane was flying or landing. He was not injured by service, travel or flight in the aircraft. His death occurred after the service, travel and flight had terminated. His death resulted from the direct attack by the Japanese as he was attempting to reach land. No risk of aviation was involved in his death. A risk of war resulted in his death, and that was a risk not excluded by the policy. Petitioner at page 15 of its argument, in support of the petition, admits that the company, by writing this policy, intended to cover war risks.

CONCLUSION.

WHEREFORE, respondent respectfully prays that the petition for certiorari be denied.

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